Petition

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81-958

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

_____TERM _____198____

_____

OSCAR HOMERO GOMEZ GUZMAN,
LUIS VILLA ANDRADE, ET AL,

PETITIONERS

VS

UNITED STATES OF AMERICA, ET AL,

RESPONDENTS

_____

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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* Oscar Homero Gomez Guzman, Luis Villa Andrade, Rafael Lujan, Jose Arambula Ramos, Antonio Nieto Pastrana, Hipolito Mendoza, Enrique Galvan Guevara, Ernesto Martinez Montenegro, Jesus Becerra Dunos, et al vs United States of America, Director of Immigration and Naturalization Service of the United States and the Attorney General of the United States.

The petitioners, Oscar Homero Gomez Guzman, Luis Villa Andrade Rafael Lujan, Jose Arambula Ramos, Antonio Nieto Pastrana, Hipolito Mendoza, Enrique Galvan Guevara, Ernesto Martinez Montenegro, Jesus Becerra Dunos, et al, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on September 29, 1981.

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QUESTIONS PRESENTED

1. Whether the knowing and intentional application of Title 8 USCS Section 1324 (a)(2) (transportation of illegal aliens) and Title 8 USCS Section 1325 (illegal entry) in an arbitrary and capricious manner violates the due process clause of the Fifth Amendment of the United States Constitution.

2. Whether Title 8 USCS Section 1325 (illegal entry) violates the Fifth Amendment to the United States Constitution by depriving the Petitioners of life, liberty, and property without due process of law.

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OPINIONS BELOW

The opinion of the Court of Appeals was not published (Appendix at 1 thru 9).

JURISDICTION

The judgment of the court of Appeals was entered on September 29 1981. The jurisdiction of this court is invoked under 28 USCS 1254 (1).

CONSTITUTIONAL, STATUTORY, AND RULES PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in part:

> No person shall be deprived of life, liberty, or property, without due process of law.

Title 8 USCS Section 1324 (a)(2) provides in part as follows:

"(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who-- ***"

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

"(4)***any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or

any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs:..."

Title 8 USCS Section 1325 provides as follows:

"Any alien who (1) enters the United States at any time or place other than as designated by immigration officers,or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or

misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than $500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than $1,000 or both."

Rule 12(b)(6) of the Federal Rules of Civil Procedure states in pertinent part as follows:

"Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:***(6) failure to state a claim upon which relief can be granted."

STATEMENT OF FACTS

The executive branch of the government has an unwritten but closely followed policy of not prosecuting illegal aliens who are caught being transported. Although these aliens have violated 18 USCS Sec. 1325 (illegal entry), the government deports them to Mexico without charge or conviction. The government's policy is to prosecute the illegal alien transporter for illegal entry rather than the

felony offense of transporting aliens. The only transporters who receive felony convictions are those who are caught transporting an extremely large number of aliens, have a prior criminal record, or are American citizens.

Petitioners brought this class action and civil rights suit against the United States of America and made the following two contentions:

1. That the government has knowingly and intentionally applied Title 8 USCS Section 1324(a)(2) (transportation of illegal aliens) and Title 8 USCS Section 1325 (illegal entry) in an arbitrary and capricious manner in violation of the due process clause of the Fifth Amendment.

2. That Title 8 USCS Section 1325 (illegal entry) violates the Fifth Amendment to the United States Constitution

by depriving Petitioners of life, liberty, and property without due process of law.

The district court dismissed the complaint for failure to state a claim on which relief can be granted. The Court of Appeals affirmed the decision of the District Court.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ON IMPORTANT ISSUES AFFECTING FEDERAL CONSTITUTIONAL RIGHTS.

A. The executive branch of the government is knowingly and intentionally applying Title 8 USCS, Section 1325 (illegal entry) and Title 8 USCS Section 1324(a)(2) (transportation) in an arbitrary and capricious manner in violation of the due process clause of the Fifth Amendment.

"In the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." Connolly v Union Sewer Pipe Co., 184 US 540, 559 (1902). "Due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of government." Duncan v Missouri, 152 US 377, 381 (1894). " 'All men are equal before the law;' 'This is a government of laws and not of men;" 'No man is above the law,'--are all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute, and apply laws." Truax v Corrigan,, 257 US 312, 332 (1921); Also see Oyler v Boles, 368 US 448 (1962).

In Caldwell v Texas, 137 US 692, 697-98 (1891), the court stated:

"Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requisition is satisfied. And due process is secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. The power of the State must be exerted within the limits of those principles, and its exertion cannot be sustained when special, partial, and arbitrary."

In Jones v Securities and Exchange Comm., 298 US 1, 23-4 (1935), the court stated:

"It violates the cardinal precept upon which the constitutional safe-

guards of personal liberty rest--that this shall be a government of laws--because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as law as a human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant, and if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect, and turn aside the danger at its beginning."

The executive and judicial branch of government have assumed the power to grant freedom or conviction for the exact same offense and also to grant

a misdemeanor or a felony for the exact same offense. The decisions are absolutely discretionary and vest the particular officer with an arbitrary power which our Constitution was designed to prevent. The application of these laws in this manner has resulted in a government of men rather than one of laws.

In The Constitution of Liberty, Freidrich A. Hayek wrote:

> "When we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free. It is because the lawgiver does not know how the particular cases to which

his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule. Because the rule is laid down in ignorance of the particular case and no man's will decides the coercion used to enforce it, the law is not arbitrary. This, however, is true only if by "law" we mean the general rules that apply equally to everybody."

* * *

"There are, of course, areas where the administration must be free to act as it sees fit. Under the rule of law, however, this does not apply to coercive powers over the citizen. The rule of law requires that the executive

in its coercive action be bound by the rules which prescribe not only when and where it may use coercion but also in what manner it may do so. The only way in which this can be ensured is to make all its actions of this kind subject to judicial review."

Hayek, "The Constitution of Liberty", (1960) pp. 153; 211.

John Locke wrote:

"Freedom of men under government is to have a standing rule to live by common to everyone of that society and made by the legislative power vested in it." Locke, Treatises on Government, II 1960.

Aristotle wrote:

"The only stable state is one in which all men are equal before the law." Aristotle, Politics V.

Finally, the gravamen of the offense is not the evil motivation of the enforcer but simply the arbitrary enforcement of the law. And because the petitioners may have received benefits from such arbitrary enforcement does not deprive them of their right to be treated like everyone else.

II

TITLE 8 USCS SECTION 1325 (ILLEGAL) ENTRY) VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION BY DEPRIVING ILLEGAL ALIENS OF LIFE, LIBERTY, AND PROPERTY WITHOUT DUE PROCESS OF LAW.

There are certain fundamental and God-given rights which exist in all men regardless of nationality. These include life, liberty, and the accumulation of property. The right to life necessarily includes the right to sustain that life through labor. God

created each person differently and so each person has his own talents and abilities that are to be used to sustain his life. God endows in the person the right to accumulate the fruits of his labors that result from a utilization of these talents and abilities.

It is self-evident that God, not government, endows these rights in all men. In fact, government is called into existence in order to protect these rights. Since these rights precede the existence of government and are endowed in the individual by the Creator, no government can legitimately take them away. This concept is recognized in our Declaration of Independence. As the court in Colorado Anti-Discrimination Comm. v Case, 380 P2d 34, 39 (Colorado 1962) stated:

> "We have no hesitancy in stating that there are fundamental and inherent rights with which all humans are endowed even though no specific mention

is made of them in either the national or state constitutions. 'Truths' held to be self-evident in the language of the Declaration of Independence are that, '***all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.***' Natural rights--inherent rights and liberties, are not the creatures of constitutional provisions either at the national or state level. The inherent human freedoms with which mankind is endowed are 'antecedent to all earthly governments; rights that cannot be repealed or

> restrained by human laws; rights derived from the Great Legislator of the Universe.' In the early case of Gow v Binghan, 507 Misc. 66, 107 N.Y.S. 1011, this principle was recognized. It was there held that all men have rights which have their origin as natural rights independent of any express provision of law, and that constitutional provisions are not the sources of these rights."

While the Declaration of Independence is not organic law in this nation, the United States Supreme Court has held that the principles enunciated therein are the essence of the thought and spirit of the Constitution:

"The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness. "

"While such declarations of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet

> the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of the constitutional provisions intended to secure that equality of rights which is the foundation of free government." Gulf, C. & S.F.R. Co. v Ellis, 165 US 150, 159-160 (1897).

These principles were made a part of our Constitution through the passage of the Fifth Amendment: "No person shall be...deprived of life, liberty, or property, without due

process of law." "Due process of law is a summarized constitutional guarantee of respect for those personal immunities which...are so rooted in the traditions and conscience of our people as to be ranked as fundamental, or are implicit in the concept of ordered liberty." Rochin v California, 342 US 165, 169 (1952).

The illegal alien enters the United States in order to utilize the talents God gave him to sustain his life. Due to the irrational economic and political policies of the Mexican government, these aliens are denied employment in Mexico. The choice remaining open to them is death by starvation or employment in the United States. The aliens easily find employment

with American employers who willingly hire them. Both the employer and the employee benefit because they consider themselves better off than they were before the employment.

In his concurring opinion in Butcher's Union S.H.&L.S.L. Co. v Crescent City L.S.L.&S.H. Co., 111 US 746, 757 (1884), Mr. Justice Field stated:

> "The property which man has in his own labor, as it is the original foundation of all property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without

injury to his neighbor, is a plain violation of the most sacred property. It is a manifest encroachment upon the just liberty of both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper." "Quoting Adam Smith, Wealth of Nations).

In Munn v Illinois, 94 US 113 (1877), Mr. Justice Field, dissenting, stated:

"By the term 'life', as here used, something more is meant than mere animal existence. The inhibitions against its deprivation extends to all those

limbs and faculties by which life is enjoyed... The deprivation not only of life, but of whatever God has given to every one with life, for its growth and enjoyment, is prohibited by the provision in question,' if its efficacy be not frittered away by judicial decision.

"By the term 'liberty', as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness, that is, to pursue such callings

and avocations as may be most suitable to develop his capacities, and to give them their highest enjoyment."

In Smith v Texas, 233 US 630, 636 (1914), the court stated:

"Life, liberty, property, and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are

permitted to work. Liberty means more than freedom from servitude, and the constitution guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling."

In Terrace v Thompson, 263 US 197, 216, 217 (1923), the Court stated:

> (The Constitution protects) the alien resident in his right to earn a livelihood by following ordinary occupations of life. Alien inhabitants of a state, as well as all other persons within its jurisdiction, may invoke the protection of those clauses." (parentheses added)

In Prudential Ins. Co. v Cheek, 259 US 530, 536 (1922), the Court stated:

> "That freedom in the making of contracts of personal employment, by which labor and other services are exchanged for money for other forms of property, is an elementary part of the rights of personal liberty and private property, not to be struck down directly, or arbitrarily interfered with, consistently with the due process of law guaranteed by the 14th Amendment, we are not disposed to question. This court has affirmed the principle in recent cases."

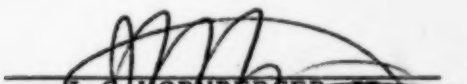
No government has legitimate authority to deprive an individual of the right to sustain his life

through labor when the alternative for that individual is death.

CONCLUSION

For the reasons stated, this petition for writ of certiorari should be granted.

Respectfully submitted,



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915 Victoria Street
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ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

A copy of the above and foregoing Petition for Writ of Certiorari has this 18th day of November, 1981, been mailed to Ms. Angela Flores, Assistant United States Attorney, P. O. Box 61129, Houston, Texas 77208.

J. G. HORNBERGER, JR.

IN THE

UNITED STATES DISTRICT COURT OF APPEALS

FOR THE FIFTH CIRCUIT _ UNIT A

NO. 81-2014

Summary Calendar

(DO NOT PUBLISH)

OSCAR HOMERO GUZMAN, ET AL,
Plaintiffs-Appellants

VS

UNITED STATES OF AMERICA, DIRECTOR OF Immigration and Naturalization Service of the United States, et al
Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(SEPTEMBER 29, 1981)

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

Appellants are nine Mexican citizens and residents who, at the time this complaint was filed, were incarceratedin the United States for

violations of 8 U.S.C. Sec. 1324(a)(2), transportation of illegal aliens, or 8 U.S.C. Sec. 1325, illegal entry of aliens. Appellants challenged the constitutionality of these two statutes, sought an injunction against their enforcement, and a further injunction prohibiting both the segregation of complainants in prison and their disposition. Suit was filed against the United States, the Director of the Immigration and Naturalization Service and the Attorney General of the United States. Complainants alleged that they bought this action as representatives of a class composed of all illegal aliens who are Mexican citizens and who are or will be incarcerated in the future for violation of 8 U.S.C. Sec. 1324 (a)(2) and 1325. Jurisdiction was asserted under the fifth, ninth and tenth amendments

of the Constitution and under 42 U.S.C. Sec. 1983 and 28 U.S.C. Sec. 2201.

Defendants moved for dismissal, and alternatively moved for summary judgment. The court dismissed all claims except the charges that 8 U.S. C. Sec. 1324(a)(2) was being discriminatorily enforced against Mexicans and that Mexicans are subjected to segregated confinement. In order to facilitate their appeal, appellants were allowed to voluntarily dismiss these two claims without prejudice.

The claims before us are those found to be without merit and dismissed by the trial judge under Fed. R. Civ.P. 12(b)(6). On appeal it is claimed that 8 U.S.C. Sec. 1325, which relates to entry of aliens, violates the due process clause of the fifth amendment because it deprives Mexican nationals

of the right to work in the United States. Appellants further contend that 8 U.S.C. Sec. 1324(a)(2) and 1325 are applied in an arbitrary and capricious manner, contrary to the due process clause of the fifth amendment. Finding no merit in appellants' contentions, we affirm the district court.

Appellants base their claimed right of entry on provisions of the Declaration of Independence which, they contend, are embodied in the Constitution. Appellant cites no persuasive authority for this proposition. To the contrary, in Kleindienst v Mandel, 408 U.S. 753, 762 (1972), the Supreme Court stated: "It is clear...an unadmitted and nonresident alien (has) no constitutional right of entry to this country as a nonimmigrant or otherwise."

A complaint should not be dismissed under Rule 12(b)(2) unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." See Miller v Stanmore, 636 F.2d 986, 992 (5th Cir. 1981) (citing Conley v Gibson, 355 U.S. 41 (1957)). It is clear that this standard has been met. No facts could be alleged to support the legal conclusion that the federal government has no power to exclude noncitizens. Plaintiffs are of course free to apply to enter the United States and to appeal Immigration and Naturalization Service orders denying them entry. See generally Sannon v United States, 631 F.2d 1247 (5th Cir. 1980).

Appellant's second claim is that of Section 1324(a)(2) and 1325

are enforced in an arbitrary and capricious manner in violation of due process clause of the fifth amendment. They allege that (1) illegal alien transportees are deported, not prosecuted; (2) illegal alien transportees are prosecuted under the illegal entry statute, Sec. 1325, which is a misdemeanor statute; rather than Sec. 1324, a felony statute, and incarcerated while American transporters are given probation; and (3) the only transporters who receive felony convictions are those caught transporting a large number of aliens, have a prior criminal record, or are American citizens.

Under the equal protection component of the fifth amendment, see Bolling v Sharpe, 347 U.S. 497 (1954), selective enforcement is

is constitutionally impermissible if based on improper motives. See United States v Lichenstein, 610 F.2d 1272, 1281 (5th Cir.),cert. denied sub nom., Bella v United States, 447 U.S. 907 (1980) (citing Oyler v Boles, 368 US 448 (1962)). A complaint must show, however, that "(1) others similarly situated have not generally been prosecuted and (2) that the government's discriminatory selection of him is invidious, or in bad faith--that is, based on constitutionally impermissible considerations, such as race or religion." Id. at 1281. There is nothing in the record to support the suggestion that illegal alien transportees are unconstitutionally deported.

Moreover, appellants' complaint

that illegal alien transporters are prosecuted under the misdemeanor statute, Sec. 1325, rather than under the felony statute, Sec. 1324, alleges, as the district court noted, the very antithesis of injury, the opposite of impermissible disparate treatment.

The complaint also alleges that 8 U.S.C. Sec. 1324 is unconstitutionally vague and exceeds the commerce power of the federal government because it is an attempt to regulate the internal commerce of a state and that the "human rights doctrine" of the Carter administration should not be asserted by the United States as long as plaintiffs are denied economic asylum. These allegations, dismissed by the district court, were not briefed, are

patently frivolous, and are rejected.

Neither party noted the lack of class certification and the probability that this case is now moot. Because we find the allegations in the complaint presented to us on this appeal to be patently without merit, we have determined that it is appropriate to pretermit consideration of those two threshold questions and to address the merits of the appeal.

The district court is AFFIRMED.

IN THE UNITED STATES DISTRICT

COURT FOR THE SOUTHERN DISTRICT

OF TEXAS

LAREDO DIVISION

OSCAR HOMERO GOMEZ GUZMAN
ET AL

VS

UNITED STATES OF AMERICA, ET AL

CIVIL ACTION NO.L-80-13

FILED DECEMBER 31, 1980

ORDER OF DISMISSAL

Reference is made to the Court's Memorandum and Order of December 12, 1980. At that time, it was ordered that Plaintiff's Complaint be dismissed in its entirety for failure to state a cause of action except for two portions thereof, namely the allegation of discriminatory

prosecution set forth in paragraph XI(A)(2) of the complaint and the allegation with respect to segregation in confinement facilities set forth in paragraph XV, Count II of the complaint, tendering a proposed First Amended Original Complaint in which the foregoing two causes of action would be deleted. Plaintiffs say that they no longer wish to pursue those two counts but instead wish to terminate the proceedings at this point so that they can have a final judgment and forthwith an appeal. The attorneys for both parties appeared in open court on December 31, 1980, at which time the Court expressed the view that it would not appropriate to file an amended complaint which would essentially contain those causes

of action that have already been stricken by the Court. For that reason, it is ordered that Plaintiffs' Motion for Leave to Amend Complaint is hereby DENIED.

At that point, in open court, attorney J. G. Hornberger,Jr., on behalf of all plaintiffs, orally moved for a voluntary dismissal of all remaining counts in Plaintiff's Original complaint, specifically those reflected in paragraph XI(A)(2) and paragraph XV, Count II. The Defendants responded by and through their attorney in open court that they had no objection to the motion. The Court being of the opinion that such motion should be granted, it is ORDERED that the following causes of action contained in Plaintiffs' Original Complaint be and the same are now DISMISSED without prejudice:

(1) The allegation that 8 USC Sec. 1324(a)(2) has been and is being intentionally and knowingly applied by the Attorney General in a discriminatory fashion, to prosecute Mexican nationals but not Anglo-Americans. Plaintiffs' complaint, paragraph XI (A)(2).

(2) The allegation that Mexican nationals are deliberately segregated from United States citizens in confinement facilities after being sentenced for violations of 8 U.S.C. Sec. 1324 and 1325. Plaintiffs' complaint, paragraph XV, Count II.

DONE at Laredo, Texas, this 31st day of December, 1980.

/s/ GEORGE P. KAZEN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT
OF TEXAS
LAREDO DIVISION

OSCAR HOMERO GOMEZ GUZMAN, ET AL

VS

UNITED STATES OF AMERICA, ET AL

Civil Action No. L-80-13

FILED DECEMBER 31st, 1980

FINAL JUDGMENT

The Court having dismissed substantial portions of Plaintiffs' Original Complaint for failure to state a cause of action in an order dated December 12, 1980 and now having dismissed the remaining two counts without prejudice upon motion by the Plaintiffs in an Order signed earlier this day, it is now ORDERED that Plaintiffs take nothing against the

Defendants.

DONE at Laredo, Texas, this 31st day of December, 1980.

/s/ GEORGE P. KAZEN
UNITED STATES DISTRICT JUDGE